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CIMB BANK BHD v. VOO SIN PEI

COURT OF APPEAL, PUTRAJAYA
MARY LIM JCA
ZABARIAH MOHD YUSOF JCA
VAZEER ALAM MYDIN MEERA JCA
B [CIVIL APPEAL NO: S-02(NCVC)(A)-2075-10-2018]
21 JANUARY 2020

C ***CIVIL PROCEDURE:*** *Judgments – Merger – Default in repayment of banking facilities – First guarantor entered into consent judgment with bank and settled with reduced sum – Second guarantor proceeded to full trial – Whether second guarantor may still be made liable in face of consent judgment – Whether principle of merger applied – Whether there was another cause of action – Whether there was preservation of right to sue*

D Southern Bank Bhd granted facilities to Borneo Cergas Sdn Bhd ('company') which were guaranteed by the respondent and one Pua. When the company defaulted in its repayment, the appellant, as the successor-in-title of Southern Bank Bhd, sued the company and the guarantors at the High Court ('2006 suit'). A consent judgment was entered between the appellant and Pua but the suit against the company and the respondent proceeded to full trial ('consent
E judgment'). At the conclusion of the trial, judgment was obtained against the company and the respondent ('23 August judgment'). The company and the respondent appealed. Before the appeal commenced, it was discovered that the company was de-registered for failure to file its annual returns. The appellant then filed an application *via* originating summons, at the High
F Court, to restore the company to the Register of Companies. The High Court (i) granted the appellant's application to restore the company to the Register of Companies; (ii) declared the 23 August judgment and the 2006 suit a nullity; and (iii) ordered a re-trial of the 2006 suit. When the parties' respective appeals to the appellate courts were unsuccessful, the respondent
G filed an originating summons at the High Court, seeking the orders earlier identified. At the High Court, the issues that arose were (i) were the issues raised in the application, which was the merger of judgment and nullity of the judgment in the 23 August judgment, raised and decided in the 2006 suit and at the Court of Appeal; (ii) was the respondent raising a new defence to
H the 2006 suit; (iii) did s. 41 of the Specific Relief Act 1950 apply to the respondent's application; and (iv) whether there was a merger of judgments. The High Court found that (i) the issue of merger did not arise in the 2006 suit and neither did it arise at the Court of Appeal; (ii) the question of whether the respondent was raising a new defence to the 2006 suit did not
I arise as the 2006 suit had been concluded; (iii) any liability which the respondent may have would have, in law, merged in the consent judgment. Pua had agreed with the appellant to pay a reduced sum of RM500,000 in

satisfaction of the consent judgment and the amount was paid. There was a merger of the judgment; (iv) there was no further cause of action against the appellant upon the consent judgment having been satisfied by Pua by payment of RM500,000 in the 2006 suit; and (v) as there was merger of the judgment, the court would be incompetent to deliver another judgment based on the same cause of action. Hence, the present appeal. The issue that arose for adjudication was whether the respondent, the second guarantor to the facilities granted by the appellant, as the successor-in-title, may still be made liable in the face of the consent judgment.

Held (allowing appeal with costs; setting aside decision of High Court)
Per Mary Lim JCA delivering the judgment of the court:

(1) The principle of merger, if it applies, prevents a second action from being brought for the same cause of action. The principle does not operate when there is another separate cause of action. However, that second action may face other issues or challenges such as the doctrine of *res judicata*; but it would not fail because of the doctrine of merger. (para 22)

(2) The respondent was sued in the same action as Pua and the company. It was not a case of one action following another. Furthermore, this was unaffected by the order of retrial as, in essence, it was still the retrial of the case against the respondent in the same original action. (para 30)

(3) The doctrine of merger is not engaged where, *inter alia*, there is preservation of the right to sue. The Judicial Commissioner failed to appreciate that there was preservation of the right to sue the other defendants, namely the respondent, by the incorporation of the clear words 'pay the plaintiff jointly and severally and on a joint and several liability basis'. (para 31)

(4) The principle of merger was not applicable here. The consent judgment expressly reserved the right and cause of action against the remaining defendants and for the purpose of the appeal, the respondent. The conduct of the parties, for that matter, confirmed that apprehension, meaning and intent of the consent judgment that liability was, at all times, joint and several. (para 32)

Case(s) referred to:

Alliance Bank Malaysia Bhd v. Mukhriz Mahathir & Anor [2006] 2 CLJ 723 HC ***(refd)***
Asia Commercial Finance (M) Bhd v. Island Rentals Sdn Bhd & Ors [2002] 2 CLJ 741 HC ***(refd)***
Bank Bumiputera (M) Bhd & Anor v. Lorrain Esme Osman & Another Case [1987] 1 CLJ 572; [1987] CLJ (Rep) 472 HC ***(refd)***
Hammond v. Schofield [1891] 1 QB 453 ***(refd)***
Hoare v. Niblett [1891] 1 QB 781 ***(refd)***
Ibig @ David Rampas & Anor v. Terisah Bahan & Ors [2016] 8 CLJ 790 CA ***(refd)***
Kamarulzaman Omar & Ors v. Yakub Husin & Ors [2014] 1 CLJ 987 FC ***(refd)***
Parr v. Snell & Ors [1923] 1 KBD 1 ***(refd)***

A *Re Wong Mun Chong; Ex-parte: AmFinance Bhd [2008] 1 LNS 20 HC* ***(refd)***
Sateras Resources (Malaysia) Bhd v. Pengurusan Danaharta Nasional Bhd & Ors [2008] 1 LNS 717 CA ***(refd)***
The Bank of East Asia Ltd v. Tan Chin Mong Holdings (S) Pte Ltd & Ors [2000] SGHC 250 ***(refd)***

B **Legislation referred to:**
Rules of the High Court 1980, O. 14
Specific Relief Act 1950, s. 41

For the appellant - Zaleha Mohd Yusuf Pan & Cason Chin Jia Sheng; M/s Peter Lo & Co
For the respondent - Francis Wong & Voo Jin Min; M/s Voo & Co
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[Editor's note: Appeal from High Court, Sandakan; Originating Summons No: SDK-24NCVC-5-5-2018 (overruled).]

Reported by Najib Tamby

D **JUDGMENT**

Mary Lim JCA:

[1] The respondent successfully secured the following declaratory orders, that:

E (i) a consent judgment dated 26 June 2009 entered in Civil Suit No. S22-07 of 2006 (2006 suit) between the appellant and one Pua Soo Siang had merged in the 2006 suit;

(ii) the respondent's indebtedness, if any, to the appellant had merged in the 2006 suit;

F (iii) there was no further cause of action against the respondent upon the consent judgment having been satisfied by Pua Soo Siang by payment of a reduced sum of RM500,000 in suit 2006;

(iv) alternatively, a declaration that the judgment dated 23 August 2013 G against the respondent be and is hereby set aside.

[2] The appellant who was the plaintiff in suit 2006 and the respondent in the originating summons where the above declaratory orders were granted, appealed.

H **[3]** Upon careful deliberation, we unanimously allowed the appeal for the following reasons.

Background Facts

[4] The appellant's predecessor-in-title, Southern Bank Berhad, granted trade facilities to a company known as Borneo Cergas Sdn Bhd I (the company). The respondent and one Pua Soo Siang were the guarantors to those facilities. The company defaulted in its repayments and the appellant

who had by this time succeeded Southern Bank, sued the company together with the guarantors before the High Court sitting at Sandakan Civil Suit No. S22-07 of 2006 (the 2006 suit).

[5] On 26 June 2009, consent judgment was entered between the appellant and Pua Soo Siang (see p. 62 of the record of appeal). As for the suit against the company and the respondent, that proceeded to full trial and judgment was obtained against both defendants on 23 August 2013 for the sum of RM2,488,090.98 together with interest.

[6] Both the defendants appealed. On 29 November 2016, the Court of Appeal dismissed the respondent's appeal. Before the hearing of the respondent's appeal at the Court of Appeal, it was discovered that the company had been deregistered for failure to file its annual returns. The appellant then filed an application at the High Court under Originating Summons No. SDK-24NCvC-9-3-2016 (OS application) to restore the company to the Register of Companies which is kept by Companies Commission of Malaysia (CCM).

[7] On 14 December 2016, the High Court in the OS application:

(i) granted the appellant's application to restore the company to the Register of Companies;

(ii) declared the judgment dated 23 August 2013 in the 2006 suit a nullity;

(iii) ordered a retrial of the 2006 suit.

[8] The appellant appealed. On 27 September 2018, its appeal was struck out.

[9] The respondent who was dissatisfied with the Court of Appeal's decision dismissing his appeal in the 2006 suit then applied for leave to appeal to the Federal Court. We understand the respondent's application for leave to appeal to the Federal Court was subsequently withdrawn *vide* notice of discontinuance dated 9 May 2019.

[10] What the respondent did was to file in May 2018, an originating summons at the High Court at Sandakan, seeking the orders earlier identified. The respondent was successful in its application. The present appeal is in respect of that decision. Meanwhile, the retrial that was ordered in the OS application has been stayed pending the outcome of this appeal.

Decision Of The High Court

[11] Four issues were settled for determination by the High Court, namely:

(i) Are the issues raised in this application, that is, merger of judgment and nullity of the judgment dated 23 August 2013 raised and decided in the 2006 suit as well as at the Court of Appeal?

(ii) Is the plaintiff raising a new defence to the 2006 suit?

A (iii) Does s. 41 of the Specific Relief Act 1950 apply to the plaintiff's application herein?

(iv) Whether there is a merger of judgment?

[12] The High Court found that the issue of merger did not arise in the 2006 B suit; neither did it arise at the Court of Appeal. As for the second issue, the High Court concluded that the question did not arise as the 2006 suit had already been concluded. The High Court found that it had jurisdiction to hear the matter and finally, on the fourth issue, the High Court answered that "any liability which the plaintiff may have would had in law merged in the said C consent judgment. Pua had agreed with the defendant to pay a reduced sum of RM500,000 in satisfaction of the consent judgment and the said amount was paid. Following the authorities above, there is a merger of the judgment. There is no further cause of action against the plaintiff upon the consent judgment having been satisfied by the said Pua by payment of a reduced sum of RM500,000 in 2006 suit. As there is a merger of the judgment, the court D would be incompetent to deliver another judgment based on the same cause of action."

Our Deliberations And Decision

[13] The appellant withdrew arguments on s. 41 of the Specific Relief Act E 1950 and whether the issue of merger had been raised in both the 2006 suit and the Court of Appeal appeal. The focus before us was on the doctrine of merger, whether with the consent judgment, the respondent's liability as guarantor and thereby any cause of action against him had merged with that judgment such that the respondent was no longer liable as guarantor and that F there was thus no cause of action against the respondent.

[14] The High Court had answered the question posed in the respondent's favour, finding the presence of the clear statement that Pua's liability to pay the appellant was on a "joint and several liability basis" meant that "any liability which the plaintiff may have would had in law merged in the said G consent judgment."

[15] The doctrine of merger is well-explained in the decision of *Bank Bumiputera (M) Bhd & Anor v. Lorrain Esme Osman & Another Case* [1987] 1 CLJ 572; [1987] CLJ (Rep) 472. This principle was rightly noted by the learned Judicial Commissioner (learned JC) who went on to see how it was H understood and applied in several cases, namely in *Asia Commercial Finance (M) Bhd v. Island Rentals Sdn Bhd & Ors* [2002] 2 CLJ 741; *Re Wong Mun Chong; Ex-parte: AmFinance Bhd* [2008] 1 LNS 20; [2008] MLJU 10 and *Sateras Resources (Malaysia) Bhd v. Pengurusan Danaharta Nasional Bhd & Ors* [2008] 1 LNS 717; concluding that where final judgment has been entered I against some defendants in respect of their liability under a contract, the contract and the cause of action then merges with the judgment leaving no cause of action against any remaining defendant.

[16] From the relevant parts of the judgments cited, it would be reasonable to say that the learned JC understood that where the liability of the defendants is joint and several, the "judgment creditor is at liberty to enforce its judgment against either one of the defendants or against all of the defendants. The case of *Yeo Ah Wang (supra)* with respect, does not seem to me to have followed this principle. In my view, a judgment creditor can choose to proceed either against one or any of the judgment debtors to recover its debt"; and of "the right of the co-contractor when sued in a second action on the same contract to insist, though not a party to the first action, on the rule that there shall not be more than one judgment on one entire contract ... that the contract is merged in the judgment, and therefore the cause of action on the contract is gone. A more substantial way of putting the matter is that each joint contractor has a right to have his co-contractors joined as parties so as to have them before the court."

[17] Learned counsel for the appellant submitted that the learned JC had erred in his interpretation of the terms of the consent judgment, and had misdirected himself on the legal principles, not having read the relevant cases in full or properly. Learned counsel further maintained that the principle of merger is not engaged since liability was on the basis of it being joint and several and that the consent judgment carried that into effect.

[18] The respondent on the other hand argued that any liability which the respondent may have had has merged in the said consent judgment. This is regardless of the nature of the liability and more so when the consent judgment has been paid up.

[19] The material question before us thus is whether the respondent, the second guarantor to the trading facilities granted by the appellant (as successor-in-title) may still be made liable in the face of the consent judgment entered on 26 June 2009. The relevant parts of the consent judgment which lie at the heart of the issue reads as follows:

> By Consent It Is This Day Adjudged that the 2nd Defendant do pay the Plaintiff **jointly and severally and on a joint and several liability basis** the sum of RM2,488,090.98 together with interest at the rate of 3.5% per annum above the Plaintiff's Base Lending Rate accruing on a daily basis and compounded monthly on the sum of RM2,488,090.98 from 1st September 2005 to the date of actual full payment and costs on a solicitor and client basis
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> (emphasis added)

[20] Having discerned the position in law, we agree with the submissions of the appellant. As pointed out earlier, the doctrine of merger is clearly set explained in *Bank Bumiputera (M) Sdn Bhd & Anor v. Lorrain Esme Osman & Another* case (*supra*):

> **When a judgment has been given in an action, the cause of action in respect of which it was given is merged in the judgment and its place is taken by the rights created by the judgment, so that a second action may**

not be brought on that cause of action. There will be no merger unless the causes of action is the same in other actions. *Halsbury Laws of England*, 4th Edn, Vol 26, p 274. In *Isaacs & Son v. Salbstein & Anor* [1916] 2 KB 139, Pickford LJ said:

> If the liability is joint, there is only one cause of action, and that becomes merged with the judgment, if the liability is several, there are two causes of action and there is no merger by reason of the judgment.

In *Goldrei, Foucard & Son v. Sinclair* [1918] 1 KB 180, the English Court of Appeal held that the plaintiffs were entitled to recover as there were two causes of action, one against the company for rescission of the agreement and the repayment of the $105, in respect of which fraud was not a necessary element, and the other against both defendants to recover damages for fraud; and that the judgment against the company and the claim for rescission was no bar to the claim against the first defendant for damages for fraud.

(emphasis added)

[21] See also Court of Appeal decision in *Ibig @ David Rampas & Anor v. Terisah Bahan & Ors* [2016] 8 CLJ 790 citing the Federal Court decision in *Kamarulzaman Omar & Ors v. Yakub Husin & Ors* [2014] 1 CLJ 987 on the principle of merger:

> …The cause of action of the appellants against the first to the fourth respondents was fraud in the distribution of the estate of the deceased. When judgment was entered against the first to fourth respondents, all allegations of fraud which gave rise to the cause of action merged with the judgment (see *Distillers Co Bio-Chemicals (Australia) Pty Ltd v. Ajax Insurance Co Ltd* (1974) 2 ALR 321, where the High Court of Australia per Menzies J said: "… the plaintiff's cause of action against the insured would merge in the judgment once it was obtained …") and the rights of the appellants to relief became rights to enforce the judgment (see *Liaw Watt Lee & Ors v. Baiduri Bank Bhd And Another Appeal* [2010] 5 MLJ 551, where the Brunei Court of Appeal per Power PCA expressed that generally when judgment is given in an action, the original causes of action merge in the judgment the plaintiff's rights to relief as expressed in the statement of claim are extinguished and become rights to enforce the judgment instead.")

[22] It is the judgment that operates to merge the cause of action upon which action is brought with the judgment that is pronounced. This would include a judgment reached by consent. The principle of merger, if it applies, prevents a second action from being brought for the same cause of action. The principle does not operate when there is another separate cause of action. However, that second action may face other issues or challenges such as the doctrine of *res judicata*; but it would not fail because of the doctrine of merger.

[23] Had the authorities cited and relied on by the High Court been properly considered, we are confident that His Lordship would have concluded in the appellant's favour. With respect, the authorities were not considered fully and properly. In fact, none of the authorities cited support the conclusion reached.

[24] In *Asia Commercial Finance*, the second, third and fourth defendants, the guarantors to the loan granted to the first defendant were sued as jointly and severally liable for the loan. However, the words "jointly and severally" were conspicuously absent in the prayer. Thus, when judgment was entered against the first and third defendants and later against the fourth defendants, there was no mention as to how the liability was incurred *inter se* the defendants. The second defendant applied to strike out the action on the principle of merger. The High Court agreed, taking the view that liability was joint and as opined in *Parr v. Snell & Ors* [1923] 1 KBD 1, that where final judgment has been obtained against two of three defendants sued for damages for breach of a joint contract, the contract is merged in the judgment and therefore the cause of action in contract is gone. Hence, when judgment was entered, the cause of action merged with the judgment and no cause of action remained against the second defendant.

[25] Aside from the caution expressed by the Court of Appeal in *Sateras Resources (supra)*, that the decision in *Asia Commercial Finance* must not be expanded beyond its facts, the circumstances in *Asia Commercial Finance* are in any event entirely different from the present appeal. The consent judgment distinctly specifies that "the second defendant do pay the plaintiff jointly and severally and on a joint and several liability basis", leaving in no doubt that the separate cause of action against any other defendant, subsists and remains intact. In this appeal, the separate cause of action against the respondent has not merged with the consent judgment.

[26] The learned JC had also relied on *Wong Mun Chong (supra)*; but that decision concerned an appeal by a judgment debtor who had failed to persuade the learned Senior Assistant Registrar to set aside a bankruptcy notice issued against him. The relevant part of that decision cited by the learned JC on the contrary supports the appellant's case, that where "liability of the defendants on the judgment debt is joint and several … this means the judgment creditor is at liberty to enforce its judgment against either one of the defendants or against all of the defendants." Because payment and liability is distinctly reserved and specified as "joint and several" in the consent judgment, we are in no doubt that the principle of merger is not applicable on the facts in this appeal; and that the learned JC had clearly erred in holding otherwise.

[27] Then there is the Court of Appeal decision of *Sateras Resources*. That decision, too, has been misread by the High Court. In that appeal, a winding-up petition had been filed upon a summary judgment obtained against the appellant and another company. The respondent filed winding-up petitions

against both companies, relying on the same summary judgment. The judgment remained unsatisfied. The issue that arose was whether having filed a winding-up petition against the other company, was the respondent barred from instituting a similar petition against the appellant.

[28] Now, not only was the Court of Appeal in *Sateras Resources* not inclined to follow *Asia Commercial Finance*, it pointed out that the English decision of *Parr v. Snell* had been revisited in *Alliance Bank Malaysia Bhd v. Mukhriz Mahathir & Anor* [2006] 2 CLJ 723; [2006] 1 MLRH 295; [2006] 4 MLJ 451; [2006] 3 AMR 580 where Ramly Ali J noted the following:

> It must be noted that the Court of Appeal in that case had made a finding of facts that the relevant contract entered into by the plaintiff and all the three defendants was a joint contract, after taking into consideration the nature of the undertaking given by all of them to the plaintiff. The undertaking in that case is not for payment of liquidated amount, as in the present case. The undertaking in that case is to find a purchaser to purchase the plaintiff's shares upon his relinquishing his post as secretary of company. There is no indication or evidence at all to show that the undertaking was given on a "joint and several" basis, as in our present action. Scrutton LJ provided exception to the rule, ie, "unless there is some rule or statute which prevents the operation of the old rule."
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> One of the rules cited by the learned judge is "Order XIII – relating to judgment signed in default of appearance", were it was held:
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> > In Order XIII and in Order XXVII if it is a case of a debt or liquidated demand, judgment may be signed against one for default of appearance or default of pleading, and yet the plaintiff may go on and sign judgment against the others.

[29] The Court of Appeal went on to observe that the "so-called 'old rule' was a "technical rule" as acknowledged by Scrutton LJ; and furthermore, the 'old rule' that still survived in *Parr v. Snell* was in respect of "action for damages or unliquidated demand where the plaintiff is not allowed to sign final judgment against some of the defendants and yet go on against the others or other. Therefore, in that case (*Parr v. Snell*) the Court of Appeal had rightly held that since the plaintiff's claim was not a liquidated claim (but for damages or unliquidated claim) the plaintiff cannot proceed against the remaining third defendant after final judgment had been entered against the other two defendants. In that case, the Court of Appeal was satisfied that there was no 'rule or statute' which [*sic*] present the operation of the 'old rule.'"

[30] Another pertinent point that was picked up by the Court of Appeal in *Sateras Resources* (*supra*) after examining *Parr v. Snell* (*supra*), *Hammond v. Schofield* [1891] 1 QB 453; and *Hoare v. Niblett* [1891] 1 QB 781; is the fact that "in all those three cases one action followed another"; that *Parr v. Snell* should not be glossed over resulting in a 'technical rule being applied

indiscriminately and *Asia Commercial Finance (M) Bhd* should not be expanded beyond the facts of the case. In this appeal, final judgment was obtained against both the appellant and Cosmopac in the one and same action pursuant to O. 14 Rules of the High Court 1980 and remain uncontested. We do not see any merit in applying the "technical rule" here." Similarly, the respondent was sued in the same action as Pua and the company; it was not a case of one action following another; and this is unaffected by the order of retrial as in essence, it is still the retrial of the case against the respondent in the same original action.

[31] Finally, the Singapore decision of *The Bank of East Asia Ltd v. Tan Chin Mong Holdings (S) Pte Ltd & Ors* [2000] SGHC 250. A careful reading of this decision also does not yield the conclusion suggested by learned counsel for the respondent. The doctrine of merger is not engaged where *inter alia* there is preservation of the right to sue. We find that the learned JC had failed to appreciate that there was preservation of the right to sue the other defendants, and that would be the respondent in this appeal, by the incorporation of the clear words "pay the plaintiff jointly and severally and on a joint and several liability basis".

[32] For all the reasons set out above, we unanimously find the appeal to be of merit. We find that the principle of merger is not applicable here; that the consent judgment has expressly reserved the right and cause of action against the remaining defendants, and for the purpose of this appeal, it would be the respondent. The conduct of the parties for that matter, confirms that apprehension, meaning and intent of the consent judgment that liability was at all times, joint and several.

[33] Consequently, the appeal is allowed with costs and the decision of the High Court is set aside.